Supreme Court, U.S.
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No. 95-361

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SUN COUNTRY AIRLINES, INC.,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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November 9, 1995

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LIST OF PARTIES TO THE PROCEEDING PURSUANT TO RULES 14.1(b) AND 29.1

Pursuant to Supreme Court Rule 14.1(b), Petitioner Sun Country Airlines, Inc. certifies that the names of all parties to this proceeding appear in the caption of this petition for a writ of *certiorari*.

Pursuant to Supreme Court Rule 29.1, Petitioner Sun Country Airlines, Inc. certifies that it is a charter air carrier certificated by the FAA under Part 121 of the Federal Aviation Regulations. Sun Country does not have any outstanding publicly-traded securities, nor does Sun Country have a publicly-owned parent, subsidiary, or affiliate.

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PETITIONER'S REPLY BRIEF

Sun Country Airlines, Inc., pursuant to Supreme Court Rule 15.6, respectfully submits its reply brief in support of its petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

ARGUMENT

The Federal Aviation Administration ("FAA") misconceives the question presented in this proceeding. The adequacy of the agency's justification for the substance of the challenged Final Rule is not the point. The issue

raised by Sun Country, and completely ignored by the FAA, is that the agency reversed a prior decision not to promulgate substantially the same rule without providing any explanation for taking a different course.

This misconception is the entire crux of the FAA's position and is distilled in a single sentence: "An agency official's testimony before a congressional committee should not preclude the agency from initiating new rulemaking to re-examine a problem or data relevant to its resolution." FAA Brief in Op., p. 5. That statement may be true enough as far as it goes, but it does not go far enough in this instance. The FAA utterly failed to explain the reasons for its reversal of a prior decision on the same subject.

This Court's opinion in *State Farm* expressly teaches that an administrative agency's determinations are not immutable. When an agency chooses to reverse its course, however, it must supply a reasoned analysis for the change. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). If an agency fails to provide the requisite reasoned analysis, its action is arbitrary and capricious in violation of the Administrative Procedure Act.

Sun Country thus disagrees with the FAA's statement to the extent that it would allow an agency to reverse a past decision without supplying the requisite reasoned analysis for the change. So long as a reasoned analysis is provided, Sun Country does not dispute the ability of an agency to reverse a decision, even one that was reaffirmed by subsequent testimony before Congress. Here, however, the FAA presented no reasoned analysis for its change of position. The entire administrative record is devoid of any explanation that supports the agency's change of position. If, in fact, the only thing that caused the FAA to reconsider its 1989 decision is that the agency, under a new administration, reached a different conclusion using the same data, such fact is not stated in the

administrative record. The FAA's reasoning is therefore intolerably mute.

The following facts are uncontroverted in this proceeding. The FAA reversed its 1989 decision not to promulgate essentially the same flight attendant duty and rest regulations that were adopted in 1994 in FAA Docket No. 27229. The FAA's Associate Administrator for Regulation and Certification, during March 1991 testimony to the congressional committee charged with oversight of the agency, (1) reaffirmed the agency's 1989 decision not to promulgate the subject regulations and (2) severely disparaged the results of the 1989 Industry Study.

The FAA therefore cannot logically maintain that its 1994 decision to adopt the same rule was based in large part, if not completely, on the 1989 Industry Study which it found totally wanting in 1991.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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